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(3)

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 825 /02

IN THE MATTER OF:

1. **KUBER GANDA , aged about 18 years**
   Son of Shri Jhumuk Ganda
   R/o Pnnhsheel Nagar,
   Raipur, [C.G.]

2. **JONY @ BENAR, aged about 23 years**
   Son of Shri Jaisat Sendre
   R/o Ganga Nagar, Raipur [C.G.] **APPLICANTS**
   [IN JAIL]

Mr. A. P. Gurjar Advocate

C.R. to D.R. (J)
28/08

VERSUS

STATE OF CHHATTISGARH **RESPONDENT**

CRIMINAL APPEAL UNDER SECTION 374[2] OF THE CRIMINAL PROCEDURE CODE 1973.

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

(31)

CRIMINAL APPEAL NO.819 OF 2002

Ajju Mahanand and another

- Versus -

State of Chhattisgarh

AND

CRIMINAL APPEAL NO.829 OF 2002

Kartik Sona

- Versus -

State of Chhattisgarh

AND

CRIMINAL APPEAL NO.825 OF 2002

Kuber Ganda and another

- Versus -

State of Chhattisgarh

AND

CRIMINAL APPEAL NO.869 OF 2002

Ram Vishvakarma

- Versus -

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-

JUDGE

28-11-2003

HON'BLE THE CHIEF JUSTICE

I agree.

Sd/-

Chief Justice

POST FOR JUDGMENT ON 16th. OF DECEMBER, 2003

Sd/-

L.C. Bhadoo

Judge

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HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

CRIMINAL APPEAL NO.819 OF 2002

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State of Chhattisgarh

AND

CRIMINAL APPEAL NO.869 OF 2002

Ram Vishvakarma

- Versus -

State of Chhattisgarh

Present: -

Mr. Utkarsh Verma, Advocate:	For the appellants in Criminal Appeal Nos.819/2002, 829/2002 & 825/2002.
Mr. L.C. Dash, Advocate:	For the appellant in Criminal Appeal No.869/2002.
Mr. P.S. Koshy, Government Advocate:	For the State/respondent.

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DIVISION BENCH: - Hon'ble Shri K.H.N. Kuranga, C.J.
and Hon'ble Shri L.C. Bhadoo, J.

JUDGMENT

(Delivered on 16th. of December, 2003)

The following judgment of the Court was delivered by *Justice L.C. Bhadoo*: -

1. The above accused/appellants have preferred these appeals under Section 374 (2) of the Cr.P.C. being aggrieved by the judgment of conviction dated 27th June, 2002, passed by the 6th Additional Sessions Judge, Raipur, in Sessions Trial No.133/2001, by which the learned Additional Sessions Judge after holding the accused/appellants guilty of commission of the offences under Section 302 read with Section 149 of the I.P.C. and Section 148 of the I.P.C. convicted them for the said offences and sentenced each of them to undergo imprisonment for life and to pay a fine of Rs.2,000/-, in default of payment of fine to further undergo rigorous imprisonment for three months under Section 302 read with Section 149 of the I.P.C. and to undergo rigorous imprisonment for three years under Section 148 of the I.P.C.

2. Since these appeals are arising out of the same incident and are filed against the same judgment, they are being disposed of by this common judgment.

3. Briefly stated facts of the prosecution case are that in the morning of 31st December, 2000, a scuffle took place between deceased Madhu Nirmalkar and Vinod, but they were separated. On the same day evening, at about 6.30 - 7 p.m. Nand Kumar, brother-in-law of the deceased was at his residence, at that time, Jaiswal Tailor came and informed Nand Kumar that some boys of Jal Vihar Colony have assaulted Madhu Nirmalkar with knife and he was lying in injured condition. Nand Kumar went to the residence of Madhu and saw that the gate of the house of Madhu was broken. On enquiry, the

neighbourers informed him that after dragging Madhu out of his residence, Vinod along with Ram Vishwakarma, Shambhoo, Ajju @ Arjun, Jony @ Benar, Kartik Odiya etc., had assaulted Madhu with knife, club, belt & chain. On hearing this, Nand Kumar reached the hospital where he saw Madhu and on enquiry, by indicating towards Vinod, Madhu informed Nand Kumar that Vinod has assaulted him with knife, but Madhu could not speak further and he succumbed to the injuries sustained by him. Madhu received various injuries on buttock and iliac crest region and blood was coming out of the injuries. Nand Kumar reported the matter at the Police Station: Civil Lines, Raipur.

4. On receiving the information, the case was registered and Dehati Nalishi (Ex.P-21) was recorded. Sushil Kumar (PW-9), the Head Constable, has stated that the Dehati Nalishi (Ex.P-21) was registered by him. R.S. Tiwari (PW-4), the Assistant Sub-Inspector, has stated that at about 22:15 hours when he was on duty in the Police Station, on the report of Harendra Singh Thakur, the Constable, he registered the F.I.R. (Ex.P-16). PW-7 Diwaker Yadav, Ward Boy of the hospital gave merg intimation to the Police Station on 01.01.2001. The Investigating Officer after giving notice (Ex.P-3) to the witnesses prepared the Panchanama of the dead body of Madhu Nirmalkar vide Ex.P-2. Post-mortem examination of the dead body was conducted by Dr. Ullas Gunnade on 01.01.2001 at about 12:30 Noon and after conducting the post-mortem examination, he prepared the post-mortem report Ex.P-26 and the body was handed over to Nand Kumar, brother-in-law of the deceased vide Ex.P-19. The weapons of offence were recovered by the Investigating Officer on the basis of memorandum given by the accused persons and the same were sent to Forensic Science Laboratory vide Ex.P-23. The Forensic Science Laboratory report (Ex.P-29) was received.

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5. After completion of the investigation, charge sheet was filed against the accused/appellants in the Court of Chief Judicial Magistrate, Raipur, who in turn committed the case to the Sessions Judge, Raipur, from where the 6th Additional Sessions Judge, received the case on transfer. As accused Vinod being a juvenile, the Police submitted the papers before the Juvenile Board for proceeding against Vinod under the Juvenile Justice Act, 2000. The learned Additional Sessions Judge after hearing the arguments of the Additional Public Prosecutor and counsel for the accused persons and after perusal of the challan papers was of the opinion that there was material on record for framing charges for the offences punishable under Sections 148 & 302 of the I.P.C. and in alternative under Section 302 read with Section 149 of the I.P.C. against the accused persons. Accordingly, he framed charges against the accused persons and read over and explained the same to the accused persons. The accused persons denied the charges and claimed to be tried.

6. The prosecution in order to prove the offence against the accused persons examined in all 17 witnesses. Statements of the accused persons were recorded under Section 313 of the Cr.P.C., in which all the accused either denied the prosecution evidence or stated that they do not know anything. They further stated that the witnesses are false and they have not committed any crime and they have been falsely implicated in the crime.

7. The learned Additional Sessions Judge after hearing the arguments of the Additional Public Prosecutor and counsel for the accused persons and after placing reliance on the prosecution evidence, mainly on the evidence of Sanjay Mesram (PW-1), Kundan Lal Yadav (PW-2), Nand Kumar Nirmalkar (PW-8) and Investigating Officer Vikash Thakur (PW-15), convicted and sentenced the accused persons in the manner stated above.

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8. We have heard the learned counsel appearing on behalf of the accused/appellants and learned Government Advocate for the State/respondent.

9. As far as the death of Madhu Nirmalkar being homicidal is concerned, counsel for the accused/appellants have not disputed this fact. Dr. Ullas Gunnade (PW-13) has stated that on 1st January, 2001, he was working in the Medical College in the Forensic Medicine Department and at about 12.30 p.m. Police Station: Civil Lines, Raipur, has sent the body of Madhu Nirmalkar for post mortem examination. He conducted the post mortem examination and found that there was incised wound, oblique present on medial surface of left index finger at upper third; a contusion, fresh, present on lateral surface of left arm size 4" x 3"; a graze abrasion present on left side, 3" below inferior angle of scapula size 4" x 3 ½", oblique, directed medially to laterally, downward to upward; a transverse stab incised wound elliptical, present 9 cm. Below and 3 cm. lateral to highest point of left iliac crest, size 1.5 cm. x 0.6 cm. 3.5 cm.; a vertical, stab incised wound, present 10 cm. below and 9 cm. right lateral to highest point of left iliac crest, directed from right to left from upwards to down wards, size 2 cm. x 0.7 cm. x 5.5 cm., elliptical; a vertically oblique, stab incised wound, present 14 cm. below and 4 cm. left lateral to highest point of right iliac crest, a nick present on medial border 1.2 cm. above lower end triangular shape nick, angle on medially and free bare laterally, directed upward towards right to left side, in between pierce, skin, subcutaneous tissue, muscles of perennial region, 2 cm. x 0.7 cm. x 6 cm. size; a vertical, elliptical, stab incised wound present 23 cm. below and 4 cm. right lateral to highest point of left iliac crest size 1.5 x 0.5 cm. directed below upwards from lateral to medially, pierce skin, subcutaneous tissue, muscles and perennial region; a contusion present on mid third of right thigh posteriorly; and a contusion present on mid third of left thigh

posteriorly. The doctor opined that the death was due to shock and haemorrhage on account of injury to internal iliac vessel by injury No.(H) i.e. stab injury. He further opined that the injury No.(H) was caused by hard, sharp and penetrating object and the injuries were sufficient to cause death in ordinary course of circumstances and they are homicidal in nature. So, in view of this evidence of the doctor, it stands proved that the death of Madhu Nirmalkar was homicidal in nature.

10. Now coming to the involvement of the accused/appellants in committing the murder of Madhu Nirmalkar, the prosecution has adduced the following evidence in order to prove the crime: -

    a. The dying declaration made by deceased Madhu Nirmalkar before Nand Kumar Nirmalkar (PW-8).
    b. The evidence of Sanjay Mesram (PW-1) and Kundan Lal Yadav (PW-2), the eyewitnesses.
    c. Recovery of weapon of offences at the instance of the accused persons.

11. Dying declaration: - As far as the evidence of Nand Kumar Nirmalkar (PW-8) is concerned, he has stated that on receiving the information about the incident he reached the spot, but by that time Madhu Nirmalkar was already taken to Mekahara Hospital and therefore, he went to the X-Ray Room of the Mekahara Hospital where Madhu was present. When he enquired from him as to what happened, he was asking for water, but the doctor said, "do not give him water". From there, he was taken to emergency room and by that time the Police also came and Nand Kumar again enquired from Madhu, then he could only speak that quarrel took place with Vinod Deep and beyond that he could not speak anything. Thereafter, the doctor said that the injured required blood. He gave his blood and during the treatment Madhu Nirmalkar succumbed to the injuries sustained by him.

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Thereafter, on asking by the Police, he gave Dehati Nalishi, report of the incident, Ex.P-21.

12. In view of the above evidence, it is clear that deceased Madhu Nirmalkar, on enquiry by this witness, stated that the he received the injuries on account of quarrel with Vinod. The deceased had not stated anything against the present accused/appellants to Nand Kumar. Therefore, there is no evidence against the present accused/appellants as nothing has been stated by this witness Nand Kumar, against the present accused/ appellants. As far as accused Vinod is concerned, being a juvenile, against him separate proceedings have been initiated before the Juvenile Board.

13. Evidence of PW-1 & PW-2: - Now coming to the evidence of Kundan Lal Yadav (PW-2), he has been examined by the prosecution as an eyewitness and he has stated that in the morning there was some quarrel between deceased Madhu and accused Vinod and he intervened and separated them. Thereafter, after some time, Vinod again stood on the way having a stick in his hand and when Madhu was riding a bicycle he assaulted Madhu with the stick, but Madhu escaped. In the evening, at about 6.30 or 7 p.m. Vinod went to the house of Madhu and started exchanging hot words and some quarrel also took place between the two and in that process Vinod received abrasions on the left hand and chest. Vinod returned to his residence and thereafter, accused Ram Vishwakarma, Ajju, Kuber, Kartik, Shambhoo and Jony @ Benar were called by him and after seeing the injury on the body of Vinod, all of them became angry and went to the house of Madhu, entered into his house after breaking the door, dragged him out of the house and started assaulting him by fist and kick and with dangerous weapons like knife and stick. As far as the evidence of this witness is concerned, the counsel for the accused persons argued that the statement of this witness under Section 161 of the Cr.P.C. was not recorded and

prosecution had not shown him as an eyewitness to the incident. He was shown as a witness to the memorandum of recovery and Panchanama of the body. Therefore, his evidence cannot be taken into consideration.

14. We are of the opinion that there is substance in the submission of the counsel for the accused persons. In the charge sheet, this witness (PW-2) has been shown as witness to the memorandum and recoveries and he has not been shown as eyewitness to the incident, nor his statement was recorded by the Police under Section 161 of the Cr.P.C. Therefore, there is no previous statement of this witness and for the first time, before the Court, he gave the evidence that he saw the incident of assaulting the deceased by all the accused persons. Therefore, we are of the opinion that the evidence of this witness as an eyewitness cannot be relied upon and taken into consideration for connecting the accused/appellants with the murder of deceased Madhu Nirmalkar. A similar view was taken by the Hon'ble Apex Court in the matter of **Ram Lakhan Singh and others vs. The State of Uttar Pradesh** reported in **AIR 1977 Supreme Court 1936**, in which the Hon'ble Apex Court held that,

> "In a grave charge like the present, it will not be proper to place reliance on a witness who never figured during the investigation and was not named in the charge sheet. The accused who are entitled to know his earlier version to the police are naturally deprived of an opportunity of effective cross-examination and it will be difficult to give any credence to a statement which was given for the first time in court after about a year of the occurrence."

Therefore, in view of the above principle laid down by the Hon'ble Apex Court, we are also of the opinion that much credence cannot be given to the evidence of this witness (PW-2). Moreover, this witness has stated that Dr. Vijay Namdev Padukar, Vishal Pandey, Geeta Bai, Udeshiya Bai, Smt. Saraswati and other persons had seen the incident. But, none of these persons has been produced by the prosecution. As has been held

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by the Apex Court, where there is no previous statement of a witness, the accused is deprived of his right to cross-examine the witness effectively.

15. Now, coming to the evidence of Sanjay Mesram (PW-1) who is a neighbourer of deceased Madhu Nirmalkar, this witness has also been declared hostile and he has not supported the prosecution case. He has simply stated in his evidence that in the evening when he was at his residence, he saw that there was a group of persons standing near the house of deceased Madhu. Dr. Vijay Sahu, Kundan Yadav and neighbour Kankar were standing there. At that time, accused Kuber came and started hurling abuses on Madhu by saying that Madhu has assaulted his nephew, he will not leave him alive, he will murder him and for that he was prepared to go to jail. There were two other persons with accused Kuber and they started pushing and banging the door of the house of the deceased. Dr. Vijay Sahu tried to intervene, but accused Kuber did not pay any heed to the request of Dr. Vijay Sahu. Accused Kuber asked Jony @ Benar to bring the weapon and on this accused Jony ran for bringing the weapon. PW-1 Sanjay Mesram has further stated that he could not identify the other two boys who were with accused Kuber. He stated that Kundan was also present there and at that time Jony @ Benar assaulted Madhu Nirmalkar with stick on his neck and on account of that Madhu fell down in the drain. Kuber came and assaulted with a lump/clod of earth (a stone weighing 2 Kgs.) on the back of the deceased. At that time, accused Ajju Mahanand, Kartik and Shambhoo were also present there. They lifted Madhu from the drain and took him towards Sudama Street and for some time, this witness (PW-1) stayed there and these persons already left that place. Therefore, the only evidence given by this witness is that, accused Jony assaulted with hockey stick on the neck of the deceased and accused Kuber hit him with a lump/clod of earth (weighing 2 Kgs.). Therefore, virtually there is no evidence to show who inflicted the

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incised fatal injuries/wounds on iliac crest which were received by the deceased by which internal iliac vessel was cut and on account of which blood started oozing out of it and on account of excessive bleeding, the deceased succumbed to the injuries. The only evidence is that Jony assaulted with hockey stick and Kuber assaulted with a stone and as per the post-mortem report and the evidence of Dr. Ullas Gunnade (PW-13) that 3" below inferior scapula region there was an injury of the size of 4" x 3 ½" oblique in nature and in the form of abrasion. It seems that this injury was caused by the assault made by accused Kuber with a lump/clod of earth or stone of 2 Kgs. weight. As far as assaulting on the neck by accused Jony is concerned, there is no corresponding injury on the neck of the deceased as per the medical evidence, therefore, as far as these two accused persons are concerned, against them only offence under Section 323 of the I.P.C. is made out. As far as the question of assault by the other accused persons, and by these two accused persons with knife and causing fatal injuries on iliac crest is concerned, there is no evidence against the accused persons. Therefore, they cannot be held liable for causing the fatal injuries.

16. Recovery of weapons of offence: - As far as the recovery of knife and other weapons of offence are concerned, in the first instance, as discussed above, there is no eyewitness who states that he saw the accused assaulting the deceased with knife. Moreover, the F.S.L. report simply says that on the knife Article-'F' which was recovered at the instance of accused Kartik; on knife Article-'G' recovered at the instance of accused Ram Vishwakarma; on hockey stick Article-'H' recovered at the instance of Ajju Mahanand; on shirt Article-'I' recovered at the instance of accused Kartik; on shirt Article-'K' recovered at the instance of accused Ram Vishwakarma; and on knife Article-'L' recovered at the instance of accused Vinod Deep, blood was found, but there is no report that this blood was human blood and was of the blood group of the deceased. Therefore, on the basis of these

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recoveries, the accused persons cannot be connected with the murder of deceased Madhu.

17. Therefore, the conviction recorded by the learned Additional Sessions Judge against the accused/appellants and finding to the effect that the accused/appellants assaulted the deceased with knife and other weapons and caused fatal injuries and are responsible for the murder of Madhu Nirmalkar and were carrying deadly weapons and were members of unlawful assembly, cannot be sustained for the reasons recorded above, as the same are not based on any reliable and cogent evidence. However, the offence under Section 323 is proved against accused/appellants Jony @ Benar and Kuber.

18. In the result, the appeals of accused/appellants Ajju Mahanand, Jony @ Benar Sendre, Kartik Sona, Shambhoo Sona, Kuber Ganda and Ram Vishwakarma succeed and the same are allowed. They are acquitted of the charges under Sections 148 and 302 read with Section 149 of the I.P.C. However, accused/appellants Jony @ Benar Sendre and Kuber Ganda are concerned the judgment of conviction and sentence are modified and they are convicted for the commission of the offence under Section 323 of the I.P.C. and are sentenced to undergo R.I. for one year and pay a fine of Rs.2,000/- each, in default of payment of fine to further undergo R.I. for three months. These two accused/appellants have already undergone the sentences. Therefore, all the accused/ appellants are directed to be released forthwith, if not required in any other case.

Sd/-
L.C. Bhadoo
Judge

16th-12-2003

Sd/-
Chief Justice

Soma